Office-Supreme Court, U.S.
FILED
JUL 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL ATOMIC COMPANY,

Petitioner,

v.

UNITED NUCLEAR CORPORATION

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California for the Fourth Appellate District, Division One

BRIEF FOR RESPONDENT IN OPPOSITION

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July 16, 1981

QUESTIONS PRESENTED

1. Whether a California court violated the Full Faith and Credit Clause of the U.S. Constitution by giving *res judicata* effect to final judgments of the courts of New Mexico, as to which judgments this Court has denied review in prior litigation between the parties, establishing under the New Mexico law of *res judicata:* (1) that petitioner waived any right to arbitrate under an arbitration agreement and that no issues arising under that agreement are arbitrable; (2) that the entire agreement, including its arbitration clause, is null, void, unenforceable and of no effect whatever; and (3) that the New Mexico courts had jurisdiction to make those determinations.

2. Whether the California court deprived petitioner of any federal right in holding that consent by respondent to personal jurisdiction in an action brought to confirm arbitration awards could not be based upon the arbitration agreement that had thus been judicially determined by final judgments of the New Mexico courts to be of no effect whatever.

3. Whether the California court deprived petitioner of any federal right in its conclusion that, even if personal jurisdiction over respondent had existed, California courts should defer, under the California doctrine of *forum non conveniens,* to the New Mexico courts, in which was pending a prior action by respondent to vacate the arbitration awards (and in which, subsequent to the decision of the California court, the arbitration awards were in fact vacated by a judgment that is *res judicta* under New Mexico law and which is now pending on petitioner's appeal to the New Mexico Supreme Court).

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent United Nuclear Corporation (UNC)[1] respectfully requests that the petition for writ of certiorari be denied.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the provisions of the Federal Arbitration Act already set forth (Pet. 4-5), the Full Faith and Credit Clause of the United States Constitution (Art. IV, §1) is involved in this case. It provides, in pertinent part, that:

> "Full Faith and Credit shall be given in each State to the * * * judicial proceedings of every other State."

[1] United Nuclear Corporation is a subsidiary of UNC Resources, Inc., and has no subsidiaries or affiliates within the meaning of Rule 28.1.

STATEMENT OF THE CASE

General Atomic Company (GAC) seeks review of a judgment of the California Court of Appeal, Fourth Appellate District, ordering the California Superior Court for the County of San Diego to dismiss for lack of jurisdiction GAC's application for confirmation of arbitration awards. As we demonstrate below, GAC's petition presents no substantial federal question meriting review by this Court. The California court properly accorded full faith and credit to New Mexico judgments as to which this Court has denied review. Those judgments conclusively establish that an arbitration clause, relied upon by GAC as the basis for *in personam* jurisdiction over UNC, has been waived by GAC and (together with the entire contract of which it was a part) is null, void, unenforceable and of no effect whatever. While the issues presented here are relatively simple, we believe that the following restatement of the case will assist the Court by placing in context the New Mexico judgments accorded full faith and credit by the California court and in rebutting certain of GAC's characterizations of the facts and issues.

A. The New Mexico Litigation

1. *Initiation of the New Mexico Litigation and GAC's Decisions to Litigate Rather Than Arbitrate.* In 1975, UNC sued GAC in the District Court of Santa Fe County, New Mexico. The complaint alleged that a uranium supply contract (the 1973 Supply Agreement) was void as a result of fraud, economic coercion, breach of fiduciary duties, and violations of the New Mexico Antitrust Act. The complaint also alleged that commercial impracticability excused performance. Although the 1973 Supply Agreement contained an arbitration clause, at no time during the nine months of active litigation preceding April 2, 1976, did GAC give UNC or any court notice of an election that it wished to arbitrate its 1973 Supply Agreement disputes with UNC.

2. *The April 2, 1976 Injunction and the First Felter Decision.* On April 2, 1976, the Santa Fe trial court issued a preliminary

injunction restraining GAC "from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action," including "the institution or prosecution of * * * arbitration proceedings * * *."[2] On its face, therefore, that injunction affected what the parties might do "in any other forum" but did not affect what they might do in the Santa Fe court. As that court found in its December 27, 1977 decision (see p. 6, *infra*), the injunction "did not prohibit GAC from demanding arbitration with UNC in this forum." (Ex. 4 to UNC Ex. 19,[3] Finding 13.)

In *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977) (*Felter I*), this Court granted GAC's petition for a writ of certiorari and reversed a decision by the New Mexico Supreme Court approving the April 2, 1976 injunction. See *General Atomic Co.* v. *Felter*, 90 N.M. 120, 560 P.2d 541 (1977). Specifically, this Court held that the Supremacy Clause as construed in *Donovan* v. *Dallas*, 377 U.S. 408 (1964), prohibits a state court from enjoining a party from initiating subsequent *in personam* actions in federal forums or invoking federal rights.[4]

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[2]The full language of the injunction is quoted in *General Atomic Co.* v. *Felter*, 434 U.S. 12, 14, n.4 (1977).

[3]Citations of the form "UNC Ex. ...." or "GAC Ex. ...." are to the exhibits filed by the parties in the California Court of Appeal. Many of these exhibits, like UNC Ex. 19 cited here, in turn have numerous exhibits.

[4]*Donovan* v. *Dallas*, invoked "a general rule * * * that state and federal courts would not interfere with or try to restrain each other's proceedings." 377 U.S. at 412. Thus, "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained on one of them which may be set up as res judicata in the other." *Id.*, quoting *Princess Lida* v. *Thompson*, 305 U.S. 456, 466 (1939). *Felter I*, therefore, did not hold that the New Mexico courts lacked jurisdiction to proceed with the case brought by UNC, or that GAC had a right to arbitrate under the 1973 Supply Agreement, or that any such right had been waived, or that a determination of those issues by the New Mexico courts could not be "set up as res judicata" in another forum. Rather, the Court simply held that the April 2, 1976 injunction was invalid insofar as it restrained GAC from bringing *in personam* actions in federal forums.

The case was remanded to the New Mexico courts "for further proceedings not inconsistent with this opinion." 434 U.S. at 19.

3. *GAC's Failure to Seek Arbitration After April 2, 1976.* GAC did not request the trial court to stay its proceedings pending review of the April 2, 1976 injunction; it continued to litigate in the New Mexico courts for more than 19 months after April 2, 1976, before demanding arbitration of the issues as to the validity and enforceability of the 1973 Supply Agreement and moving for a stay of court proceedings pending such arbitration.

On May 5, 1976, GAC filed its answer to the complaint and counterclaimed against UNC. The eighth defense of the answer (Ex. 2 to UNC Ex. 19 pp. 22-23) included allegations that "some" unspecified "issues in this case are subject to arbitration pursuant to Article XVII" of the 1973 Supply Agreement; that certain utility companies had demanded arbitration under their contracts with GAC; and that UNC's "obligations to General Atomic may be affected" by those utility arbitration proceedings. GAC went on in its eighth defense to state that it "demands arbitration" of "only" those issues which GAC might ultimately be required to arbitrate with the utility companies, but added:

> "Specifically excluded from the scope of this arbitration demand are all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement."

Moreover, GAC's election to litigate, rather than arbitrate, the issues relating to the 1973 Supply Agreement was confirmed by its counterclaim, which requested the court to specifically enforce the Agreement and award over $2 billion actual and punitive damages for its alleged breach and for UNC's alleged violation of the New Mexico antitrust laws, without any reference to arbitration. (Ex. 4 to UNC Ex. 19, Finding 9.)

During the period between the filing of its answer and counterclaim and November 1977, GAC engaged in extensive pretrial discovery against UNC and other pretrial proceedings. See *id.*, Findings 15 and 16. GAC drafted the portion of a pretrial order, entered on August 22, 1977, setting forth its claims against UNC, without referring to a claim or demand for arbitration. See *id.*, Finding 17. In September 1977, after its discovery was completed, GAC moved for summary judgment on UNC's claims of state antitrust law violation, fraud, economic coercion, and commercial impracticability. The motion was denied on October 27, 1977. See *id.*, Finding 19.

In the course of these 22 months, GAC repeatedly sought and obtained extensions of time and discovery orders from the trial court on the asserted ground that the orders were necessary in order to prepare for trial. It repeatedly invoked the appellate jurisdiction of the New Mexico courts on rulings not to its liking. See *id.*, Findings 20 and 21. But, as the trial court later found (*id.*, Finding 12):

> "At no point between the commencement of the first action, filed as Cause No. 50044 in District Court for Santa Fe County, New Mexico, and the filing of the pending Motion for Stay (a period of more than two years), did GAC file a demand for arbitration, petition any court for an order compelling arbitration, petition this court for a stay of proceedings pending arbitration, or in any way manifest its intention or desire to arbitrate rather than litigate the issues between the parties arising under the 1973 Supply Agreement."

4. *The Judgments of the New Mexico Courts as to Arbitrability and the Second Felter Decision.* On November 29, 1977, GAC filed with the American Arbitration Association (AAA) in San Diego a demand to arbitrate the disputes as to the validity and enforceability of the 1973 Supply Agreement (Ex. B to UNC Ex. 1) and, on November 30, 1977, GAC filed in the

New Mexico trial court a motion for a stay of the proceedings in that court pending such arbitration pursuant to 9 U.S.C. §3. At that time, the New Mexico case had been in trial for approximately a month. UNC resisted GAC's motion and filed a countermotion for an order enjoining arbitration.

On December 16, 1977, the trial court entered a partial final judgment granting UNC's motion to enjoin arbitration and, on December 27, 1977, a partial final judgment (Ex. 5 to UNC Ex. 19) denying GAC's motion for a stay pending arbitration was entered. On the basis of extensive findings that have been cited throughout this statement, the trial court concluded, *inter alia*, that it had jurisdiction under both the federal and state arbitration acts "to determine whether GAC may properly demand arbitration with UNC"; that "GAC has waived any rights to demand arbitration from UNC and has been in default in exercising these purported rights"; that "the issues arising under the New Mexico Antitrust Laws * * * may not be submitted to arbitration"; and that "[a]11 issues in this case are so intertwined with issues arising under the New Mexico Antitrust Laws that none of the issues can properly be submitted to arbitration." (Ex. 4 to UNC Ex. 19, Conclusions 1, 2, 7 and 8.)

GAC petitioned this Court for a writ of mandamus to the trial court to set aside *both* the December 16 and the December 27, 1977 judgments on the ground that they violated this Court's decision and mandate in *Felter I*. On May 30, 1978, this Court issued a *per curiam* opinion granting GAC's petition insofar as it requested that the December 16, 1977 judgment be vacated. *General Atomic Co.* v. *Felter*, 436 U.S. 493 (*Felter II*). In so doing, the Court concluded that only the December 16 judgment violated the decision and mandate in *Felter I*, which "held that [the Santa Fe court] lacked the power to * * * interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration." 436 U.S. at 496. Thus, the Court did not hold that GAC had a right to arbitration which had not been

waived, but only that the Santa Fe court could not enjoin "attempts" by GAC to assert in federal forums its "views" in that regard.

Moreover, this Court in *Felter II* denied GAC's petition insofar as it also sought vacation of the December 27, 1977 judgment denying GAC's request for a stay pending arbitration, since that judgment did not prevent "GAC from pursuing its arbitration claims in other forums" (436 U.S. at 498 n.2), and also because:

> "Clearly, our prior opinion did not preclude the [trial] court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decision prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums." 436 U.S. at 496-97.

On May 7, 1979, the New Mexico Supreme Court affirmed the December 27, 1977 judgment. *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105, 597 P.2d 290, *cert. denied*, 444 U.S. 911 (1979). Among other things, the court held: (1) the trial court had the jurisdiction and duty, under Section 3 of the Federal Arbitration Act, to determine whether GAC had waived its right to demand arbitration by litigation conduct amounting to a default in proceeding with arbitration (597 P.2d at 299); (2) the April 2, 1976 injunction never prohibited GAC from moving the trial court for a stay pending arbitration or from otherwise asserting in that court a demand for arbitration (*id.* at 303-05); (3) the record supported the trial court's findings of fact and conclusion that GAC had waived any right to arbitrate (*id.* at 295-307, 313); (4) in any event, the New Mexico antitrust issues were not arbitrable and all other issues were so intertwined with and permeated by those antitrust issues that they too were not arbitrable (*id.* at 309-13); and (5) the trial court's denial of

GAC's motion for a stay pending arbitration was not in violation of or inconsistent with the two *Felter* decisions (*id.* at 309). See also Brief for UNC in Opposition in No. 80-2107 at 6-7.

GAC petitioned this Court for a writ of certiorari to review that decision by the New Mexico Supreme Court. That petition (No. 79-190) argued, *inter alia*, that the New Mexico decision was void and *coram non judice*, violated this Court's two *Felter* decisions, and was inconsistent with *Sibley* v. *Tandy Corp.*, 543 F.2d 540 (5th Cir. 1976), *rehearing denied*, 547 F.2d 286, *cert. denied*, 434 U.S. 824 (1977). GAC's petition was denied. *General Atomic Co.* v. *United Nuclear Corp.*, 444 U.S. 911 (1979).

5. *The Default Judgment Against GAC and Its Affirmance by the New Mexico Supreme Court.* After GAC's motion for a stay pending arbitration was denied, the trial had proceeded. On March 27, 1978, the trial court entered an Amended Sanctions Order and Default Judgment (Ex. 7 to UNC Ex. 19) in favor of UNC on its claims against GAC, excepting damages, and struck GAC's defenses and counterclaims. The factual basis for imposing sanctions was set forth in 44 recitals, which described the two-year history of GAC's discovery failures in great detail. Among other things:

> "Based on all facts, the Court is forced to conclude, therefore, that GAC has followed a consistent pattern and practice of concealing, rather than revealing, highly relevant documents to the Court and to the parties here, and that such actions and practices have been contumacious, intentional, willful, deliberate and, in the utmost bad faith." *Id.*, Recital 24.

On April 4, 1978, the trial court entered its judgment, which declared that the 1973 Supply Agreement violated the New Mexico Antitrust Act and thus "is null, void, unenforceable and of no effect whatever" and that "performance thereunder is excused." (Ex. 8 to UNC Ex. 19, ¶ A.) On August 29, 1978, the

New Mexico Supreme Court affirmed the trial court in all material respects. *United Nuclear Corp.* v. *General Atomic Co.*, ... N.M. ....., ... P.2d ...., 1980-81 Trade Cases (CCH) ¶63,639.

GAC appealed to this Court seeking review not only of the New Mexico Supreme Court's August 29, 1980 decision but also of that court's May 7, 1979 decision, insofar as the latter decision had rejected GAC's arguments that the *Felter* decisions had been violated. GAC again argued that the New Mexico decisions violated this Court's *Felter* decisions and were inconsistent with such decisions as *Sibley* v. *Tandy Corp., supra.* J.S. (No. 80-1360), at 23-24. This Court dismissed GAC's appeal for want of jurisdiction and, treating the papers whereon the appeal was taken as a petition for writ of certiorari, denied certiorari. *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-1360, 49 U.S.L.W. 3787 (April 20, 1981), *rehearing denied*, 49 U.S.L.W. 3912 (June 8, 1981). Thus, the judgments affirmed by the May 7, 1979 and the August 29, 1980 decisions of the New Mexico Supreme Court are now final for all purposes.

B. The Arbitration Proceedings and UNC's Efforts to Halt Them

Arbitration of the 1973 Supply Agreement disputes was never ordered by any court, and GAC never petitioned any court for such an order pursuant to 9 U.S.C. §4. Its only effort in this regard was the November 30, 1977 motion in the New Mexico court for a stay of trial pending arbitration pursuant to 9 U.S.C. §3, which was denied. After GAC's demand for arbitration on November 29, 1977, the AAA assured UNC that it would hold the arbitration proceedings in abeyance "pending final resolution of its arbitrability by the appropriate court." (¶12 & Ex. 6 to UNC Ex. 19.) Notwithstanding that undertaking and repeated objections by UNC that arbitration would be inappropriate and illegal while the New Mexico judgments of December 27, 1977 and April 4, 1978 remained in effect (*id.* ¶13 & Exs. 9, 10, 12), on July 26, 1978 (two months after the *Felter II* decision and

while the arbitrability issue and the default judgment were pending on GAC's appeals to the New Mexico Supreme Court), the AAA notified UNC that it would proceed and directed UNC to appoint its arbitrator. (*Id.*, ¶14 & Ex. 14.)

On July 31, 1978, UNC filed suit against the AAA in the United States District Court for the District of New Mexico, arguing that the New Mexico judgments precluded arbitration. In decisions dated September 27 and October 26, 1978 (Pet. 125a and GAC Ex. 6), Judge Bratton for that court dismissed the complaint for lack of subject matter jurisdiction, in part because no forum — including the arbitration panel — had yet denied UNC's *res judicata* and full faith and credit claims.

Precluded by *Felter II* from obtaining injunctive relief in state courts and by Judge Bratton's decision from obtaining immediate relief in federal court, UNC designated its arbitrator under protest and specifically objected to San Diego, California, as the locale for the arbitration. (UNC Ex. 19, ¶16.) It formally protested the jurisdiction of the arbitrators, and reiterated that protest at preliminary hearings in Illinois and in written submissions. (*Id.* ¶¶17-20.) UNC was assured by GAC that "GAC will not claim that UNC's assertion, discussion, and trying of its claims, under protest, constitute waiver or abandonment of its position on res judicata and full faith and credit." (*Id.*¶21.) When the arbitrators scheduled a preliminary hearing in San Diego in March 1979, UNC made a special appearance, under protest, for the sole purpose of objecting to jurisdiction; and when the arbitrators decided to hold hearings on nonjurisdictional issues, UNC immediately withdrew from the proceeding.[5] This hearing was the only arbitration proceeding which UNC attended in California. (*Id.* ¶22.)

[5]Following the decision of the arbitrators to hold hearings on nonjurisdictional issues, UNC filed suit in the United States District Court for the Southern District of California against GAC, the AAA, and the arbitrators to enjoin the continuation of arbitration, but that suit was dismissed for lack of subject matter jurisdiction, as was a similar suit brought by UNC against Gulf Oil Corporation. (Exs. 27 & 30 to UNC Ex. 19, and Pet. 133a.).

On November 14, 1979, a majority of the arbitration panel issued a partial award concluding that the New Mexico judgments "are not res judicata and they are not entitled to full faith and credit"(Pet. 25a,47a), and that GAC had not waived its arbitration rights. *Id.* 48a-54a. On June 13, 1980, UNC's counsel wrote to the AAA reaffirming that UNC "has not participated in the arbitration except in efforts, undertaken under protest, to procure its dismissal and it will not participate in the arbitration or hearings or proceedings therein * * *." (*Id.* ¶26 and Ex.35.) Without the presence of either UNC or a UNC-designated arbitrator,[6] the two remaining arbitrators proceeded with hearings with only GAC in attendance and, on September 10, 1980, they issued a final award. (Pet. 81a.) In that award, the two arbitrators accepted GAC's *ex parte* case of contract breach, purported to pass upon UNC's antitrust claims and concluded that there was no showing of an antitrust violation,[7] awarded damages to GAC in the amount of $301,181,635, and ordered UNC to specifically perform certain provisions of the 1973 Supply Agreement amounting to delivery of over 15 million pounds of uranium concentrates to GAC.

C. Proceedings to Vacate or Confirm the Arbitration Awards

On June 9, 1980, UNC filed a First Petition for Supplemental Relief in the Santa Fe trial court seeking to vacate the partial award.

On September 12, 1980, GAC filed an application to confirm the final and partial awards pursuant to 9 U.S.C. §9 in the

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[6] Professor Julian Levi — the arbitrator designated by UNC — notified the AAA of his immediate resignation on June 13, 1980. In a later letter to the AAA, Mr. Levi confirmed that his "resignation was in no sense procured, requested, or suggested by [UNC], its counsel, or anyone acting on its behalf," and explained that it was his "personal decision," based upon a recent "cerebral episode which resulted in my hospitalization" and resulting health problems, that in fairness to the parties and his family he "should not continue to act as an arbitrator." Pet. at 123a.

[7] See Brief for UNC in Opp. in No. 80-2107 at 8 n.6.

United States District Court for the Southern District of California. (¶25 & Ex. 34 to UNC Ex. 19.)

On September 15, 1980, UNC filed in the Santa Fe trial court its Second Petition for Supplemental Relief and Application to Vacate Arbitration Award, which sought to vacate the final award pursuant to 9 U.S.C. §10 and incorporated by reference the pending First Petition for Supplemental Relief. (¶30 & Ex. 37 to UNC Ex. 19.) On October 10, 1980, that proceeding was removed by GAC to the United States District Court for the District of New Mexico. UNC moved on October 14, 1980, to remand the case to state court.

On October 24, 1980, GAC's application to confirm the arbitration awards was dismissed for lack of subject matter jurisdiction by Judge Enright of the United States District Court for the Southern District of California. (*Id.*, Ex. 41.) GAC's appeal to the Ninth Circuit (*General Atomic Co.* v. *United Nuclear Corp.*, No. 80-5830) was argued on June 2, 1981, and is currently pending.

On the same day that its federal action was dismissed, GAC filed an application to confirm the arbitration awards, under 9 U.S.C. §9, in the Superior Court of the State of California for the County of San Diego. (UNC Ex. 1.) UNC, appearing specially, moved to dismiss the proceeding for lack of *in personam* jurisdiction. (UNC Exs. 11-13.) Immediately after the trial court denied that motion, UNC petitioned the Court of Appeal of the State of California, Fourth Appellate District, for a peremptory writ of mandate.[8] On December 16, 1980, that court filed its opinion and judgment letting "a peremptory writ of mandate issue * * * directing the superior court to dismiss this action." (Pet. 2a-3a.) That decision is the subject of GAC's instant petition.

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[8] Under California law, UNC was required to seek such relief to preserve its personal jurisdiction objection. Cal. Code Civ. Proc. §418.10; *McCorkle* v. *City of Los Angeles*, 70 Cal. 2d 252, 74 Cal. Rptr. 389, 449 P.2d 453 (1969); *Neihaus* v. *Superior Court*, 69 Cal. App. 3d 340, 346 n.1, 137 Cal. Rptr. (1977).

The California court rejected GAC's argument that personal jurisdiction could be based upon the arbitration clause in the 1973 Supply Agreement, since the decisions of the New Mexico courts holding that agreement to be void "are entitled to full faith and credit," and concluded that the record does not otherwise "reveal a sufficient basis to establish personal jurisdiction" over UNC. (Pet. 1a-2a.) In addition, the court held that, even if the California courts had jurisdiction over UNC, "the doctrine of forum non conveniens would require, at minimum, a stay of the action here, in order to permit the pending action in the Santa Fe district court in New Mexico, in which the arbitration award is challenged, to proceed to judgment"; and, further, that "even if that action were not pending, the courts of New Mexico are obviously the more suitable forums to determine these issues with which they are intimately familiar." (Pet. 1a-2a.) After denying GAC's earlier petition to enjoin the then-pending Santa Fe trial court proceedings, the California Supreme Court denied GAC's petition for hearing on February 18, 1981. (Pet. 11a.)

On December 11, 1980, the United States District Court for the District of New Mexico granted UNC's motion to remand the New Mexico proceedings seeking vacation of the arbitration awards. After an independent analysis of the applicable law, Judge Bratton agreed with Judge Enright of the Southern District of California that the Federal Arbitration Act does not afford a basis for federal subject-matter jurisdiction. Following the remand, the Santa Fe trial court concluded that it had jurisdiction to review the arbitration awards under §10 of the Federal Arbitration Act, 9 U.S.C. §10, and vacated those awards as being "illegal, void and of no effect" on the grounds, *inter alia*, that the prior judgments of the New Mexico courts were *res judicata* and that the arbitrators had exceeded their jurisdiction and powers and acted in manifest disregard of the law. Although that judgment is now pending on GAC's appeal to the New Mexico Supreme Court, it is also the subject of GAC's petition for writ of mandamus in No. 80-2107; it is discussed further in UNC's brief in opposition thereto.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although the proceedings forming the background to this case are numerous and lengthy, the issues decided by the California Court of Appeal are relatively simple, and they were decided both succinctly and correctly. In final judgments as to which this Court has denied review, the New Mexico courts held that the arbitration clause relied upon by GAC as the basis for *in personam* jurisdiction of the California courts over UNC has been waived by GAC, that the dispute between UNC and GAC involves no arbitrable issues, and that the entire contract in which the arbitration clause was contained is "null, void, unenforceable and of no effect whatever * * *."[9] See pp. 6-9, *supra*. The California Court of Appeal simply accorded those New Mexico judgments full faith and credit, and thus recognized that no arbitration agreement existed upon which jurisdiction could be based. That holding does not conflict with the decision of any other court, deprive GAC of any federal right, or decide any issue of sufficient importance to deserve review by this Court.

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[9] GAC also contended below that personal service of UNC was authorized by California's "long-arm" statute, Cal. Code Civ. Proc. §410.10, by reason of UNC's isolated contacts with California. However, the record demonstrated that UNC — an out-of-state corporation — did not engage in any business activities in California (see UNC Ex. 13), and the Court of Appeal concluded that the "record does not reveal a sufficient basis to establish personal jurisdiction over" UNC in that regard (Pet. 2a.). While GAC asserts that the court below "could not ignore" UNC's appearance, under protest, in a hearing held by the arbitration panel in San Diego, and "conclude that there was no *in personam* jurisdiction over UNC" (Pet. at 16), no authority is cited for that assertion. We believe that California could not, in conformity with the federal Constitution, have based *in personam* jurisdiction over UNC on that circumstance. See, *e.g.*, *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958); *Aaron Ferer & Sons Co.* v. *Atlas Scrap Iron & Metal Co.*, 558 F.2d 450, 455 n.8 (8th Cir. 1977); *Dragor Shipping Corp.* v. *Union Tank Car Co.*, 361 F.2d 43, 49 n.12 (9th Cir.), *cert. denied*, 385 U.S. 831 (1966). But however that may be, no principle of federal law *requires* the California courts to exercise personal jurisdiction on that basis, and none has been asserted by GAC. See, *e.g.*, *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 440 (1952). California has its own constitutional due process requirement which is not "in all instances * * * interpreted indentically with the due process clause" in the federal Constitution. *Kruger* v. *Wells Fargo Bank*, 11 Cal. 3d 352, 521 P.2d 441, 450 n.21 (1974).

Moreover, the Court of Appeal concluded that, even if jurisdiction had existed, the California doctrine of *forum non conveniens* would require the California courts to defer to the pending proceeding in the New Mexico state courts. In that proceeding a judgment vacating the arbitration awards has now been entered, which itself is entitled to full faith and credit. Thus, review of the jurisdictional decision below would not serve any justifiable purpose.

ARGUMENT

A. No Substantial Federal Question Is Presented by the California Court's Accordance of Full Faith and Credit to the New Mexico Judgments.

Certainly, the California Court of Appeal did not violate the requirement in Article IV, Section 1, of the federal Constitution, that "Full Faith and Credit shall be given in each State to the * * * judicial Proceedings of every other State," in crediting the New Mexico judgments. "[T]here is no federal question involved" in a contention that a California court "gave too much faith and credit" to a judgment of a sister state. *Creager* v. *Superior Court of Santa Clara County*, 126 Cal. App. 280, 14 P.2d 552, 553 (1932).[10] But however that may be, the ruling below is entirely consonant with this Court's interpretation of the Full Faith and Credit Clause.

Under that clause, "where a state court has jurisdiction of the parties and subject matter, its judgment controls in other states to the same extent as it does in the state where rendered," *Riley* v. *New York Trust Co.*, 315 U.S. 343, 349 (1942), so that forums in other jurisdictions must give a judgment of a state court "at least the *res judicata* effect which the judgment would be accorded in the State which rendered it," *Durfee* v. *Duke*, 375 U.S. 106, 109 (1963), including that aspect of *res judicata*

[10] A California statute (Cal. Code Civ. Proc. §1913) provides that "the effect of a judicial record of a sister State is the same in this State as in the State where it was made * * *."

sometimes more particularly referred to as collateral estoppel, *Allen* v. *McCurry*, 49 U.S.L.W. 4015, 4016-17 (U.S., Dec. 9, 1980). GAC does not contend that the New Mexico courts would not give *res judicata* effect to their prior judgments holding that GAC had waived its rights under the arbitration clause in the 1973 Supply Agreement and that the agreement, including its arbitration clause, is null, void and of "no effect whatever," and it could not reasonably do so.[11] Indeed, the Santa Fe court, in vacating the very arbitration awards involved here, held those prior judgments to be *res judicata*. See p. 13, *supra*, and Pet. in No. 80-2107 at 1a-16a.

Thus, even if it were true, as GAC asserts (Pet. 23), that by giving "conclusive effect to [the] New Mexico judgments * * *, the California court failed to implement this Court's past decisions in this dispute and compounded the New Mexico courts' prior violations of the Supremacy Clause," it would be immaterial. GAC's argument in that regard (Pet. 23-26), including the alleged conflict with *Sibley* v. *Tandy Corp.*, 543 F.2d 540 (5th Cir. 1976), *rehearing denied*, 547 F.2d 286, *cert. denied*, 434 U.S. 824 (1977), is a collateral attack on the correctness of the New Mexico judgments.[12] But as this Court recently observed, in *Federated Department Stores, Inc.* v. *Moitie*, 49 U.S.L.W. 4687, 4689 (June 15, 1981):

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[11] Under the doctrines of *res judicata* and collateral estoppel applied by the New Mexico courts, "where the causes of action in the cases are identical in all respects, the first judgment is a conclusive bar upon the parties and their privies as to every issue which either was or properly could have been litigated in the previous case," and, absent identity of causes of action, they "are precluded from relitigating * * * those ultimate issues and facts shown to have been actually and necessarily determined in the previous litigation." *City of Santa Fe* v. *Velarde*, 90 N.M. 444, 564 P.2d 1326, 1328 (1977). See also, *e.g.*, *Torres* v. *Village of Capitan*, 92 N.M. 64, 582 P.2d 1277, 1280-81 (1978). This is so even if the prior judgment was entered as a discovery sanction, *Chalmers* v. *Hughes*, 83 N.M. 314, 491 P.2d 531, 532 (1971), and even if the judgment is pending on appeal, *McDonald* v. *Padilla*, 53 N.M. 116, 202 P.2d 970, 974 (1948); *Prager* v. *El Paso National Bank*, 417 F.2d 1111, 1112 (5th Cir.1969).

[12] Both *Sibley* and *Gordon* v. *Longest*, 41 U.S. (16 Pet.) 97 (1842), upon which the partial award relied (Pet. 42a-47a), reversed on direct appeal the denial of motions going to the jurisdiction of the trial court to proceed further: in *Sibley*, a "timely motion" for a stay pending arbitration (540 F.2d at 542),

> "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. * * * Nor are the res judicata consequences of a final * * * judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. * * * We have observed that the 'indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to prevent.' *Reed* v. *Allen*, 286 U.S. 191, 201 (1932)."

This is also true under the New Mexico law of *res judicata*. See, *e.g.*, *McDonald* v. *Padilla, supra*, 202 P.2d at 974; *Acequia Del Llano* v. *Acequia De Las Joyas Del Llano Frio*, 25 N.M. 134, 179 P. 235 (1919).

Moreover, in its petition for certiorari from the May 7, 1979 judgment of the New Mexico Supreme Court affirming the trial court's denial of GAC's motion for a stay pending arbitration (see Pet. in No. 79-190 at 36-38), GAC asserted essentially the

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and in *Gordon*, a motion to remove the case from state to federal court pursuant to a statute under which, once the removal application was filed, "it was the duty of the State court 'to proceed no further in the cause.'" (41 U.S. at 103). In those cases, therefore, "every step consequently taken, in the exercise of jurisdiction in the case," following the erroneous denial, "was *coram non judice*" (*id.*). On the other hand, the April 4, 1976 injunction which *Felter I* invalidated did not involve a stay of proceedings or otherwise affect the jurisdiction of the trial court; rather it restrained proceedings in other forums. Hence, as *Felter II* conclusively demonstrates, the trial court retained jurisdiction while the appeal from that injunction was pending, and thereafter, to proceed with the case before it and to render decisions adverse to the merits of GAC's arbitration claims despite its error in enjoining GAC from attempting to assert those claims in federal forums. When GAC eventually filed a motion for a stay pending arbitration, that motion — in contrast to *Sibley* — was not timely, but was filed after almost two years of intensive litigation which was held, in a judgment affirmed on direct appeal, to constitute a waiver of arbitration. In any event, contentions that proceedings in a trial court are *coram non judice*, even if sustainable on direct appeal, are barred by *res judicata* in collateral proceedings. *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 331, 336-38 (1940).

same arguments as it makes here regarding the effect of this Court's *Felter* decisions, including a claimed conflict with the *Sibley* case. See p. 8, *supra*, and 597 P.2d at 309. Those arguments were repeated in GAC's jurisdictional statement, which sought review both of the May 7, 1979 judgment rejecting those arguments and of the August 29, 1980 judgment of the New Mexico Supreme Court affirming the judgment of the trial court holding the 1973 Supply Agreement to be null, void and of no effect whatever (see pp. 8-9, *supra*, and J. S. in No. 80-1360 at 23-26). In denying that petition for certiorari and in both dismissing GAC's appeal and, treating the jurisdictional statement as a petition for certiorari, denying certiorari, this Court obviously did not consider those arguments to raise any issue deserving review.[13]

Those arguments gain no strength through further repetition in this petition. To the contrary, the action of the New Mexico Supreme Court in rejecting them in a judgment that now is final for all purposes is itself *res judicata*, since a "judgment is entitled to full faith and credit — even as to questions of jurisdiction" that have been decided therein. *Durfee* v. *Duke*, 375 U. S. 106, 111 (1963). See also, *e.g.*, *Chicot County Drainage District* v. *Baxter State Bank*, *supra*; *Ortiz* v. *Suazo*, 91 N. M. 45, 570 P. 2d 309, 313 (1977).

Hence, the California Court of Appeal plainly was correct in according full faith and credit, and thus giving *res judicata* effect, to the New Mexico judgments. That being so, it is established beyond further attack, *first*, that GAC waived any right to

[13] It is hardly conceivable that this Court would have denied direct review if it had considered GAC's arguments to have substance, since GAC in effect contends that the New Mexico courts had violated this Court's decisions and mandates in the *Felter* cases. See *Felter II*, 436 U.S. at 497. In any event, those arguments have no substance, as we demonstrated in responding to GAC's prior petition and jurisdictional statement, and as we demonstrate once again in UNC's response to the petition for writ of mandamus now pending before this Court in No. 80-2107, in which they are again reiterated by GAC. See also note 12, *supra*.

arbitrate under the arbitration clause in the 1973 Supply Agreement (and that, in any event, no issues were arbitrable), and, *second*, that the entire agreement, including its arbitration clause, is "null, void, unenforceable and of no effect whatever * * * ." Consequently, the California Court of Appeal also plainly was correct in refusing to permit *in personam* jurisdiction to be based upon an arbitration agreement which does not legally exist and has "no effect whatever," and there is no conflict with *Reed & Martin, Inc.* v. *Westinghouse Electric Corp.*, 439 F.2d 1268 (2nd Cir. 1971), GAC's assertion to the contrary (Pet. 13-17) notwithstanding.[14]

The existence of an arbitration agreement in maritime, interstate or foreign commerce, within the scope of §§1 and 2 of the Federal Arbitration Act, is essential to the jurisdiction of any court under that Act. *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 201-02 (1956). Thus, any applicability of §9 of that Act is dependent upon the existence of such an agreement. It is only if "the parties in their agreement" have specified the court in which a judgment upon an award is to be entered that a "party to the arbitration may apply to the court so specified for an order confirming the award," and only if "no court is specified in the agreement of the parties" that "such application may be made to the United States court in and for the district within which such award was made." 9 U.S.C. §9.[15]

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[14] As this Court has stated in another context, the purpose of the Federal Arbitration Act is "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). See also, *e.g.*, *Supak & Sons Mfg. Co.* v. *Pervel Industries, Inc.*, 593 F.2d 135, 137 (4th Cir. 1979); *Fairfield-Noble Corp.* v. *Pressman-Gutman Co.*, 475 F. Supp. 899, 902 n.2 (S.D.N.Y. 1979).

[15] These provisions in §9 relate to venue of the federal courts that otherwise have subject matter jurisdiction; neither they nor the other provisions of the Act confer subject matter jurisdiction upon the federal courts. See, *e.g.*, Wright, Miller & Cooper, 13 *Federal Practice and Procedure* §3569 at 468 (1975), and cases there cited. This was the holding of the United States District Court for the Southern District of California in dismissing for want of subject matter jurisdiction GAC's application to confirm, and of the United States District Court for the District of New Mexico in granting UNC's motion to remand to state court. See pp. 11-13, *supra*.

Reed & Martin, Inc. v. *Westinghouse Electric Corp., supra,* holds that, when such an arbitration agreement does exist, it may confer *in personam* jurisdiction of the parties to the agreement upon the appropriate federal district court by their "consent" in the agreement to such jurisdiction. But "[a]bsent an agreement to arbitrate," *in personam* jurisdiction cannot be obtained in that manner. *Hanes Supply Co.* v. *Valley Evaporating Co.*, 261 F.2d 29, 34 (5th Cir. 1958). Here, an arbitration agreement does not exist upon which to base such consent, since final judgments have determined beyond further attack that GAC waived any right to arbitrate under the 1973 Supply Agreement and that that agreement is null, void an of "no effect whatever." A comparable situation did not exist in *Reed & Martin,* so the decision below does not in any way conflict with that decision.[16]

There also is no conflict with *Boston & Maine Corp.* v. *Illinois Central Railroad,* 396 F.2d 425 (2d Cir. 1968), despite GAC's assertions to the contrary (Pet. 17-20). That case involved the scope of review of an arbitration award under §9 of the Federal Arbitration Act. Since the court below held that jurisdiction of GAC's application to confirm did not exist, and dismissed the application on that ground, it did not reach or decide any issue as to the scope of review of arbitration awards when jurisdiction to review does exist. The other cases cited by GAC following its citation to *Boston & Maine* (Pet. 18-19) are similarly inapplicable.

We note, moreover, that neither *Boston & Maine* nor any other decision of which we are aware holds that a court reviewing an arbitration award can deny full faith and credit to a judgment of another court, despite the commands of the Full Faith and

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[16] That is also true of *Merrill Lynch, Pierce, Fenner & Smith* v. *Lecopulos, 553 F.2d 842, 844 (2d Cir. 1977), and Necchi Sewing Machine Sales Corp.* v. *Sewline Co.*, 194 F. Supp. 602, 604 (S.D.N.Y. 1960), which are also cited by GAC (Pet. 14.).

Credit Clause of the Constitution, merely because the arbitrators did so.[17] Rather, as was held in *Telephone Workers Union* v. *N. J. Bell Telephone Co.*, 584 F.2d 31, 33 (3d Cir. 1978):

> "When a federal court is presented with the contention that a prior federal judgment determined issues now sought to be relitigated in an arbitral forum it must first determine the effect of the judgment. This is so whether the question arises in an action to compel arbitration * * * or, as here, in an action to enforce a disputed award. The federal policy favoring forum selection clauses, based in part on the institutional interest of federal courts in avoiding litigation, does not come into play until the court first determines whether prior completed litigation has already finally determined all issues."

Thus, the court in that case affirmed a judgment vacating an arbitration award which did not give a prior judicial decree the *res judicata* effect to which it was entitled. In short, the "*res judicata* or collateral estoppel effect of the prior determination is a question for the court, not for the arbitrator before whom the point is sought to be relitigated," *N.Y.S. Association for*

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[17] While the district court in *Boston & Maine* indicated that it was precluded from reviewing the merits of an arbitrator's rejection of a claim of *res judicata*, in fact the court went on to determine "that neither the defense of *res judicata* nor the related doctrine of collateral estoppel is available to the defendant" since the "decision of the State court relied upon was a denial of summary judgment, not a final judgment on the merits * * *." 274 F. Supp. 257, 260-61 (S.D.N.Y. 1967). Insofar as appears from the opinion of the Second Circuit, that issue was not involved in the appeal to that court, and there is no indication that the effect of the Full Faith and Credit Clause was considered at any time. The only other case cited by GAC which even refers to *res judicata* or full faith and credit is *Refino* v. *Feuer Transp., Inc.*, 480 F. Supp. 562 (S.D.N.Y. 1979), *aff'd without opinion*, 633 F.2d 205 (2d Cir. 1980). The assertion by the district court in that case that, "even if the arbitrator erroneously applied the doctrine of *res judicata* to the [Joint Local Committee Arbitration] decision, there would still be no basis for vacating the award," did not involve the *res judicata* (much less the full faith and credit) effect of a judicial decision, but rather related to a prior arbitration award. See 480 F. Supp. at 567.

Retarded Children v. *Carey*, 456 F. Supp. 85, 96 (E.D.N.Y. 1978).[18]

B. Other Reasons for Denying the Petition

While ordering the dismissal of GAC's application to confirm for lack of jurisdiction, the Court of Appeal also concluded (Pet. 2a) that, even if jurisdiction had existed,

> "the doctrine of forum non conveniens would require, at a minimum, a stay of the action here, in order to permit the pending action in the Santa Fe district court in New Mexico, in which the arbitration award is challenged, to proceed to judgment. Also, even if that action were not pending, the courts of New Mexico are obviously the more suitable forums to determine these issues with which they are intimately familiar. The parties have wasted too much time already in adding to the many forums in which they have litigated the state courts of California."

Hence, even if this Court should review and reverse the jurisdictional determination by the court below, that action would merely be advisory in this case as the court below has made clear that such jurisdiction would not be exercised by reason of the doctrine of *forum non conveniens* as applied by the California courts.

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[18] See also, *e.g.*, *Clemens* v. *Central R.R. of N.J.*, 399 F.2d 825 (3d Cir. 1968), *cert. denied*, 393 U.S. 1023; *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F.2d 80 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962); *Garlick Funeral Homes* v. *Local 100, Service Employees Int'l. Union*, 413 F. Supp. 130 (S.D.N.Y. 1976); *Ballard & Associates, Inc.* v. *Mangum*, 368 A.2d 548, 553 (D.C. 1977). So, too, "if no arbitration agreement exists the arbitration award and judgment entered thereon is void" and will be vacated. *Great American Trading Corp.* v. *I.C.P. Cocoa, Inc.*, 629 F.2d 1282, 1288 (7th Cir. 1980). And, where the underlying controversy has been determined in prior litigation, arbitration is barred as there is "no controversy to arbitrate." *Fremont Cake & Meal Co.* v. *Wilson & Co.*, 183 F.2d 57, 59 (8th Cir. 1950).

GAC asserts, however, that this *forum non conveniens* "holding conflicts squarely with Section 10 of the Federal Arbitration Act, 9 U.S.C. §10" (Pet. 20) and with *City of Naples* v. *Prepakt Concrete Co.*, 490 F.2d 182, *modified on other grounds*, 494 F.2d 511 (5th Cir.), *cert. denied*, 419 U.S. 843 (1974) (Pet. at 20-22). That assertion is mistaken. While we believe that GAC's argument rests on §9 rather than §10 of the Act, the operative language in both is virtually identical and clearly refers to the venue of the federal courts only. Thus, §9 provides that if "no court is specified in the agreement of the parties, then such application [to confirm an award] may be made to the United States court in and for the district within which such award was made," and §10 provides that "the United States court in and for the district wherein the award was made" may vacate an award upon application by a party thereto for specified reasons. In view of that language of §9, *City of Naples* held that a federal district court in Florida erred in enjoining proceedings before a federal district court in Ohio on an application to confirm an award, since the award was made in Ohio and only the Ohio federal court had venue.[19]

In quoting the statutory language, GAC neglected to include the language that expressly limits it to the "United States" district courts, even though GAC even now is contending in the Ninth Circuit, on its appeal from the dismissal of its application to confirm by the United States District Court for the Southern District of California, that the identical provisions of §§9 and 10 confer exclusive subject-matter jurisdiction to review arbitration awards upon the federal courts. See pp. 11-12, *supra*. The omitted language is critical for present purposes since it makes entirely clear that the limitation applies only to venue in the federal courts, not in the state courts. See *AAACon Auto Transport, Inc.* v. *Newman*, 77 Misc. 2d 1069, 356 N.Y.S.2d 171, 174-175 (1974), and *AAACon Auto Transport, Inc.* v. *Feldman*, 77 Misc. 2d 120, 353 N.Y.S.2d 851 (1973), both of

[19] *United States* v. *Ets-Hokin Corp.*, 397 F.2d 935 (9th Cir. 1968), and *Marion Mfg. Co.* v. *Long*, 588 F.2d 538 (6th Cir. 1978), also cited by GAC (Pet. at 21), similarly involved cases in the federal courts.

which applied the doctrine of *forum non conveniens* in actions under the Federal Arbitration Act, since the venue provisions of that Act do not "by their terms apply to any but the U.S. District Courts." 356 N.Y.S.2d at 174.

Such an interpretation is commanded by *Bainbridge* v. *Merchants & Miners Co.*, 287 U.S. 278 (1932). That case involved the Jones Act (now 46 U.S.C. §688), which provides: "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." This Court, which had previously held that the provision related to venue rather than to subject matter jurisdiction,[20] concluded that it did not control the venue of suits under the Jones Act in state courts, as "the correct construction of the provision limits it to the courts of the United States." *Id.* at 280. The Court pointed out (*id.* at 280-81) that:

> "The word 'district' is peculiarly apposite in that relation; but in order to apply it to a state court, whose territory for venue purposes may or may not be designated as a 'district,' an elasticity of interpretation would be required which it does not seem probable Congress had in mind. * * * If the question were more doubtful than we think it is, we should be slow to impute to Congress an intention, if it has the power, to interfere with the statutory provisions of the various states fixing the venue of their own courts. It follows that the venue should have been determined by the trial court in accordance with the law of the state." (Footnote omitted.)

See also, *e.g.*, *Pope* v. *Atlantic Coast Line Railroad*, 345 U.S. 379, 384 (1953); *Miles* v. *Illinois Central Railroad*, 315 U.S. 698, 703 (1942).

Since §§9 and 10 of the Arbitration Act expressly identify the district courts to which they refer as the "United States" district

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[20] *Panama R.R.* v. *Johnson*, 264 U.S. 375, 384-385 (1924). See 287 U.S. at 279 n.1.

courts, the inapplicability of those provisions to the venue of State courts follows *a fortiori* from *Bainbridge*. And, in such situations the state courts are free to follow the general venue principles of state law, including the principle of *forum non conveniens*. *Missouri ex rel. Southern Railway* v. *Mayfield*, 340 U.S. 1, 4-5 (1950).[21]

Moreover, since the decision by the court below, the Santa Fe trial court has granted UNC's applications to vacate the partial and final arbitration awards involved here, rejecting GAC's contentions that it lacked jurisdiction to do so. See p. 13, *supra*. While GAC has appealed that decision to the New Mexico Supreme Court, under New Mexico law that decision is *res judicata* in other cases even though under appeal. See p. 16, n. 11, *supra*. In short, even if the California courts should be held to have jurisdiction, it would be impossible for them to grant GAC effective relief, since they could not confirm an arbitration award that already has been vacated by another court in a decision that is *res judicata* under the Full Faith and Credit Clause. *Cf. Mills* v. *Green*, 159 U.S. 651, 653 (1895).

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[21] Under California law, "[w]hen a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside [the] state, the court shall stay or dismiss the action in whole or in part on any considerations that may be just." Cal. Code Civ. Proc. §410.30, subd. (a).

The Court of Appeal correctly determined that the state court of New Mexico was a more suitable forum to determine the validity of the arbitration awards. The import of prior New Mexico judgments bore heavily upon the question of validity, and the courts of New Mexico were obviously in the best position to determine the meaning of their own judgments and the effect of those judgments on the subsequent arbitration proceedings. Of course, even if the Court of Appeal erred in that determination, its error, at most, was an error of state law.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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July 16, 1981